STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 16, 2014
v	No. 311227 Ottawa Circuit Court
ROCKY SCHROEDER, JR., Defendant-Appellant.	LC No. 11-035426-FC

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (sexual penetration with a person under 13 years of age), MCL 750.520b(1)(a); and three additional counts of first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to 25 to 40 years' imprisonment for his first-degree criminal sexual conduct conviction based on his sexual penetration of a person under 13 years of age, and to 15 to 40 years' imprisonment for each of his three other first-degree criminal sexual conduct convictions. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

The victim in this case alleged that defendant, who was married to the victim's mother, sexually assaulted her over a number of years. Defendant denied the allegations, claiming that the victim fabricated the events, in part, because he was a tougher disciplinarian than the victim's mother.

On appeal, defendant argues that defense counsel was ineffective for failing to call an expert witness to testify that minor children sometimes fabricate allegations of sexual abuse. Defendant also argues that defense counsel should have called an expert to testify as to defendant's mental fitness to be a parent. He argues that defense counsel's decision to not call an expert witness was not due to trial strategy, but a result of unpaid legal fees.[1]

[1]Defendant argues that defense counsel's failure to call an expert witness was not a matter of trial strategy in this case, but rather a result of a pecuniary conflict of interest with defendant. However, within its opinion and order denying defendant's motion for a new trial, the trial court found that there was no evidence that a pecuniary conflict of interest prevented defense counsel

"The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303, citing *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997).

At the evidentiary hearing held by the trial court to decide defendant's motion for a new trial, Dr. Joseph Auffrey, a clinical and counseling psychologist, testified that he was aware of literature that showed that fabrications of sexual abuse among children are not uncommon. Auffrey also testified that he interviewed defendant and submitted defendant to various psychological tests. Based on the interview and tests, Auffrey concluded that defendant did not have any specific risk factors, acute mental illness, or personality disturbances that would affect defendant's suitability as a parent. On appeal, defendant argues that defense counsel should have called Auffrey or a similar expert witness to testify that minor children fabricate allegations of sexual abuse and in regard to defendant's mental fitness to be a parent.

In *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012), our Supreme Court explained that MRE 702, the rule of evidence governing expert testimony, requires that:

> a court evaluating proposed expert testimony must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case.

The first element (whether the expert testimony will assist the trier of fact to understand a fact in issue) is not met where "the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror." *Id*. at 121.

In this case, defendant relies on *Kowalski*, 492 Mich at 120, for his assertion that the proposition that children are capable of fabricating allegations of sexual abuse was beyond the common knowledge of the jurors. However, *Kowalski* addressed the question whether the existence of false confessions was beyond the common knowledge of jurors, and its specific legal analysis on whether false confessions are within the common knowledge of jurors is inapplicable to this case. *Id*. at 123-130.

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from upholding his professional obligation to defendant, and we hold that finding was not clearly erroneous. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002) (trial court's findings of fact are reviewed for clear error).

In deciding this issue, we find the reasoning by this Court in *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007) applicable. In *Dobek*, the trial court precluded the defendant from introducing expert testimony that the defendant "did not exhibit characteristics or fit the profile of a typical sex offender as determined by psychological testing and interviews." 274 Mich App at 92. The *Dobek* Court upheld the trial court's evidentiary ruling, in part, based on its finding that the expert's testimony came "dangerously close to constituting testimony that defendant is not a sex offender, testimony vouching for defendant's veracity, and testimony that defendant is not guilty." *Id*. at 100. Also, the *Dobek* Court found that the expert's testimony would not have explained the defendant's behavior, nor would the expert have testified regarding consistencies or inconsistencies in behaviors between sex offenders and the defendant. *Id*. Accordingly, the *Dobek* Court concluded that the expert's testimony was irrelevant because it would not have assisted the jurors to understand the evidence or determine a fact at issue. *Id*. at 95. Similarly, expert testimony that defendant did not have any specific risk factors, acute mental illness, or personality disturbances that would affect defendant's suitability as a parent would have been irrelevant and inadmissible in this case. *Id*.

Thus we conclude that the proffered expert testimony would have been irrelevant and inadmissible because as presented on appeal, such evidence would have improperly expressed an opinion about the veracity of the victim's testimony. See *People v Peterson*, 450 Mich 349, 376; 537 NW2d 857 (1995), opinion amended on other grounds 450 Mich 1212 (1995) (holding that expert witnesses may not testify regarding the percentage of children who tell the truth about allegations of sexual abuse because such testimony improperly expresses an opinion about the veracity of the victim's testimony). Accordingly, defense counsel was not ineffective for failing to introduce expert testimony because "[t]rial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, defendant fails to show that defense counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Nor has defendant shown a reasonable probability that if the expert testimony had been offered, the result of the proceeding would have been different. *Id*. at 302-303. We therefore find that defendant is not entitled to relief on this issue.

Defendant next argues that the prosecutor committed misconduct by knowingly asking a witness to provide her opinion regarding whether the victim was telling the truth. Defendant's unpreserved prosecutorial misconduct argument is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Prosecutorial misconduct occurs if a defendant is denied a fair trial, *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), and claims of prosecutorial misconduct are reviewed on a case by case basis, *Dobek*, 274 Mich App at 64. An attorney may not knowingly offer or attempt to elicit inadmissible evidence. *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). Whether a prosecutor improperly elicited testimony "is as much an evidentiary issue as it is a prosecutorial misconduct matter . . . ." *Dobek*, 274 Mich App at 70-71. It is improper for a prosecutor to ask a witness to comment on the credibility of another witness because matters of credibility are to be determined by the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

In this case, Breah Groen, a forensic interviewer with the Children's Advocacy Center in Ottawa County, interviewed the victim. During Groen's cross-examination, defense counsel engaged Groen in the following colloquy:

Defense Counsel: And you graduated in 2007, so in about five years, you've done 1,000 interviews?

Groen: Yes.

Defense Counsel: During these 1,000 interviews, how many of the interviewees have lied to you?

Groen: I don't know how many have lied to me. The --the --my job as a forensic interviewer, is not to determine truth versus lie, or if the child's statement is true. The interview is only the first step of the investigation and then -- so we're only going on the information the care giver prevent -- presents to us, and maybe any initial referral or report that's been made and information a child gives. So it's not the goal of the forensic interview to establish truth or lie. I -- I just don't have an answer for that question.

Defense Counsel: And -- and -- but that's not your role is it?

Groen: No, that's not my role.

Defense Counsel: You don't do any type of questioning to determine whether the child is lying?

Groen: I don't assess the validity of the child's statements.

Defense Counsel: So you have no idea if what [the victim] told you was the truth?

Groen: I don't. What I can say, is that she--

Defense Counsel: Well, let me -- let me ask you the next question. Were you a part of the investigation following your forensic interview?

Groen: No.

Defense Counsel: So the only role you played was in conducting the forensic interview, and your purpose in doing that is not to determine whether the person is telling the truth, correct?

Groen: That's correct. It's to gain information from a child.

After the colloquy above, defense counsel ended Groen's cross-examination and the prosecutor immediately asked follow-up questions during redirect examination:

Prosecutor: Miss Groen, you were going to say something when he asked you whether or not you can tell whether or not someone's telling the truth?

Groen: Yes.

Prosecutor: What were you going to say?

Groen: I was going to say that I cannot testify to the validity of her statements, but I can say that *she was able to provide detailed information about each of the incidents that she was describing and that her behavior was consistent throughout the interview.* [Emphasis added.]

On appeal, defendant asserts that the prosecutor's question "[w]hat were you going to say?" improperly asked Groen to offer her opinion regarding the victim's truthfulness.

However, Groen's response to the prosecutor's question stopped short of providing an opinion of the victim's truthfulness. Instead, Groen testified (1) that the victim was able to provide detailed information about each of the incidents of abuse she described to Groen, and (2) that the victim's behavior was consistent throughout the interview. Therefore, Groen's testimony reflects her personal observations regarding the victim's statements and behavior during the interview.

Even if defendant was able to show plain error in the admission of Groen's challenged testimony, defendant must also show that the admission of that evidence affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Contrary to defendant's assertions on appeal, this case presented the jury with more evidence than to be classified as a "she-said/he-said" credibility contest between the victim and defendant. Instead, the evidence generally supported that defendant had the opportunity to abuse the victim. Also, the victim testified that when she was 15 years old there was an occasion where she gave defendant oral sex in the family vehicle and defendant used a diaper to wipe up his semen and then threw the diaper out of the vehicle. The victim subsequently directed the police to search for the diaper in a specific location and the police found a diaper within five minutes of beginning the search. The fact that a diaper was found in the location where the victim said that defendant threw a diaper after an incident of sexual abuse was corroborative evidence that the incident of abuse actually occurred. Finally, the victim testified that defendant sexually abused her on a number of occasions in a barn, and that on those occasions defendant would often wipe up his semen using a blue blanket or a pair of workout pants. A blue blanket and blue and yellow workout pants were found in the barn in this case, and multiple semen stains were found on the blue blanket and workout pants. Semen samples from the workout pants and the blue blanket were matched to defendant's DNA. The fact that the victim knew where defendant kept the materials he used to wipe up his semen, a very intimate detail, also corroborates the victim's allegations of abuse that occurred in the barn. Also, while defendant claimed that his semen was found on the workout pants and blue blanket because he masturbated in the barn, defendant offers no explanation for how, in the absence of sexual abuse, the victim could have discovered the fact that defendant used the workout pants and blue blanket to wipe up his semen. In fact, defendant testified that he was very careful to avoid detection when he was masturbating in the barn. Thus, there was evidence that corroborated the victim's allegations of abuse, and defendant fails to show that the admission of Groen's challenged testimony affected the outcome of the lower court proceedings. *Id*. at 763

(defendant must show that plain error affected the outcome of the lower court proceedings to be entitled to relief).[2] Accordingly we find that defendant is not entitled to relief on this issue.

Finally, defendant alleges that several pieces of hearsay testimony were improperly admitted into evidence. This unpreserved claim is reviewed for plain error. *Carines*, 460 Mich at 763. MRE 801(c) defines "hearsay" as a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and MRE 802 provides that "hearsay" is generally not admissible except as provided within the Michigan Rules of Evidence.

We have reviewed the portions of trial testimony alleged to be inadmissible hearsay and we find that only one portion of testimony was clearly inadmissible.[3] During Groen's testimony, she testified that the victim told her about an incident in the victim's brother's room. Groen's challenged testimony constituted inadmissible hearsay under MRE 801(c) and MRE 802, and it was plain error for the trial court to admit that testimony. *Carines*, 460 Mich at 763 (review is for plain error).

However, Groen's hearsay testimony appears to have been offered to corroborate the victim's own testimony, which made it more likely that the erroneous admission of Groen's testimony was harmless in this case. *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010). Also, as previously noted, there was additional evidence that corroborated the victim's allegations of abuse. Thus, defendant fails to show that the admission of the hearsay testimony affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763 (defendant must show that plain error affected the outcome of the lower court proceedings to be entitled to relief).[4] We therefore find that defendant is not entitled to relief on any of the issues presented and therefore affirm his convictions and sentences.

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[2] Defendant's alternative argument that defense counsel was ineffective for failing to object to Groen's challenged testimony also fails because defendant does not show a reasonable probability that if defense counsel had objected to the introduction of the testimony, the result of the proceeding would have been different. *Toma*, 462 Mich at 302-303.

[3] We find that the remainder of the challenged testimony was admitted for purposes other than proving the truth of the matter asserted. Thus, this testimony was not hearsay under MRE 801(c). Accordingly, defendant is not entitled to relief as to the remainder of the challenged testimony.

[4] Relying on the totality of the evidence as herein stated, we also reject defendant's alternative argument that defense counsel was ineffective for failing to object to Groen's challenged hearsay testimony. This argument fails because given the totality of the evidence presented, defendant cannot demonstrate a reasonable probability that if defense counsel had objected to the introduction of the testimony, the result of the proceeding would have been different. *Toma*, 462 Mich at 302-303.

Affirmed.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher